SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~652~~ 19

UNITED STEELWORKERS OF AMERICA, AFL-CIO, PETITIONER,

vs.

R. H. BOULIGNY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

APPENDIX TO BRIEF FOR APPELLANT

IN THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

R. H. Bouligny, Inc., a corporation, Plaintiff,

vs.

United Steelworkers of America, AFL-CIO, an unincorporated association, Defendant.

Complaint—Filed May 29, 1963

The plaintiff, complaining of the defendant, says and alleges:

1. That the plaintiff is a North Carolina corporation, having its principal office and place of business in the City of Charlotte, Mecklenburg County, North Carolina.

2. That the defendant, as the plaintiff is informed and believes, is an unincorporated association, conducting in North Carolina the business and purposes for which it is organized.

3. That during the months of April and May, 1963, the defendant has caused to be written, published and delivered to many persons in the City of Charlotte and Mecklenburg County, North Carolina, particularly to the employees of the plaintiff, certain pamphlets and circulars containing statements with respect to the plaintiff which are false and defamatory.

[fol. 2] 4. That such pamphlets and circulars have contained untruthful and false statements, for example: —that the plaintiff has "lied to employees"; that after one, Millard Smith, had recently been discharged from the employment of the plaintiff, a representative of the management of the plaintiff, went to a Company where the said Millard Smith had subsequently found employment and "tried to

get" Millard Smith "fired" from the job which he had thus obtained after being discharged from the employment of the plaintiff; that, on such occasion and for such purpose, the aforesaid representative of the plaintiff presented to "the officials of the Company where Millard Smith had obtained a job" the "work record and progression chart" of Millard Smith "for the time he worked at Bouligny, with the hope that by doing this Millard Smith would be fired" from the job which he had obtained after being discharged from the plaintiff's employment; that the plaintiff's representative "would not only deny Millard Smith a chance to make a decent living for himself, but he has absolutely no feeling for Millard Smith's wife and four children"; that the plaintiff's representative could not "stand the thought of one of his former slaves having a job where he is now making" a rate of pay higher than he formerly made; that this is a "dirty trick" on the part of the representative of plaintiff's management; that "there is no level to which he", as a representative of plaintiff's management, "will not sink"; and that unless they embrace the defendant, the employees of the plaintiff "will always have to live in fear of people like" the representative of the plaintiff's management "doing the same thing" to them and to their "wives and children".

5. That by such false statements the defendant, through its agents and representatives, has intentionally, wilfully and maliciously slandered and libeled the plaintiff and has unlawfully defamed and injured the good name and reputa-[fol. 3] tion of the plaintiff, and has injured the relations between the plaintiff and its employees.

6. That by reason of the matters hereinabove set forth, the plaintiff has been damaged in the sum of One Hundred Thousand ($100,000.00) Dollars and is entitled to judgment against the defendant in that amount.

7. That by reason of the matters hereinabove set forth, the plaintiff is entitled to judgment against the defendant for punitive damages in an additional amount of One Hundred Thousand ($100,000.00) Dollars.

Wherefore, the plaintiff prays the Court for judgment against the defendant in the sum of Two Hundred Thousand ($200,000.00) Dollars, together with the costs of this action; and the plaintiff prays the Court for such other and further relief as to the Court may seem just and proper.

Grier, Parker, Poe & Thompson, Attorneys for the Plaintiff.

North Carolina
Mecklenburg County

Oliver R. Rowe, being first duly sworn, deposes and says that he is an officer of the plaintiff above-named, to wit, its Executive Vice-President; that he knows the contents of the foregoing Complaint and that the same is true to his own knowledge, except as to such matters as are therein stated upon information and belief, and as to these he be-
[fol. 4] lieves the said Complaint to be true.

Oliver R. Rowe

Subscribed and sworn to before me, this the 28 day of May, 1963.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

No. 9326

R. H. BOULIGNY, INC., a corporation, Plaintiff,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Defendant.

PETITION FOR REMOVAL

To the Honorable Judge of the United States District Court for the Charlotte Division of the Western District of North Carolina:

Your petitioner, United Steelworkers of America, AFL-CIO, a labor organization, existing under the laws of, and having its principal place of business in the State of Pennsylvania, respectfully shows until this Honorable Court that it is the defendant in the suit which was filed in the Superior Court of Mecklenburg County, North Carolina, on the 29th day of May, 1963, wherein R. H. Bouligny, Inc., a North Carolina corporation having its principal office and place of business in the State of North Carolina is plaintiff, and the petitioner, United Steelworkers of America, AFL-CIO, an unincorporated association, is named as party defendant (a copy of the summons and complaint in said case being attached hereto); that the matter and amount in dispute in said suit exceeds exclusive of costs and interest, the sum of Ten Thousand Dollars ($10,000); that said R. H. Bouligny, Inc., is engaged in interstate and the matters and things complained of in said complaint allegedly arose during a campaign conducted pursuant to the National Labor Relations Act, as amended, and said corporation right to proceed thereon, if any, is provided in, subject to and limited by the provisions set forth in said act; that [fol. 5] the subject matter arises under the laws of the

United States, including but not limited to laws regulating commerce; that purported service was attempted on May 31, 1963, and that the petitioner has not entered an appearance in said case and does not by this petition waive its objections to attempted service of process herein.

Petitioner avers that it was not at the time of the occurrence of the events made the basis of this suit, nor at the present time, nor at any time intervening said dates, a citizen or resident of the State of North Carolina, but during all of said time was, and is now, a citizen of the State of Pennsylvania, where it has its principal place of business; that the plaintiff, R. H. Bouligny, Inc., a corporation, was at the time of the occurrence of the events made the basis of this suit and is at the present time and was at all times intervening said dates, a citizen of the State of North Carolina.

Petitioner prays this Honorable Court to take jurisdiction of this petition and to issue all necessary orders and process in order to remove the hereinabove referred to case from the Superior Court of Mecklenburg County, North Carolina, to the District Court of the United States for the Charlotte Division of the Western District of North Carolina.

United Steelworkers of America, AFL-CIO, By Ledford and Ledford, James B. Ledword, By Cooper, Mitch & Crawford, Its Attorneys of Record.

State of North Carolina
Mecklenburg County

[fol. 6] Before me, the undersigned authority in and for said County and State, personally appeared James B. Ledford, who, being by me first duly sworn, says that he is the attorney for the petitioner in the above petition and is authorized to make this affidavit in its behalf, and that the facts in the foregoing petition are true, as he verily believes.

James B. Ledford.

Sworn to and subscribed before me this 18th day of June, 1963.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

MOTION TO REMAND—Filed July 3, 1963

Now Comes plaintiff and moves this court to remand this cause to the Superior Court of Mecklenburg County, North Carolina, from which Court it was attempted to be removed to this Court, for the following reasons and grounds:

1. No federal question is presented by this cause.

2. There is no diversity of citizenship and consequently no diversity jurisdiction by reason of the fact that the defendant is an unincorporated association and has members who are citizens of the State of North Carolina and Mecklenburg County and who are domiciled and reside therein.

3. For other reasons apparent upon the face of the record.

Wherefore, plaintiff prays that this cause may be remanded to the Superior Court of Mecklenburg County, [fol. 7] North Carolina, to be there proceeded with according to the practice governing such cases.

Date the 3rd day of July, 1963.

Grier, Parker, Poe & Thompson, By Joseph W. Grier, Jr., Attorneys for Plaintiff, Gaston H. Gage, Attorney for Plaintiff, 400 Law Building, Charlotte, North Carolina.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

MEMORANDUM OPINION—November 12, 1963

CRAVEN, Chief Judge:

On plaintiffs' motion to remand the above-captioned cases, the Court finds the ultimate facts to be that members of the defendant unincorporated association are citizens of North Carolina and that the defendant union is a juridical person as fully and completely as if it were organized as a corporation, having as great unity of action and as much power centered in the governing officers, and that its principal office and place of business is in Pittsburgh, Pennsylvania. See: *American Federation of Musicians* v. *Stein*, 213 F.2d 679 (6th Cir. 1954). There is a trend to treat unincorporated associations in the same manner as corporations and to treat them as citizens of the state wherein the principal office is located for jurisdictional purposes. But, the greater [fol. 8] number of cases still hold that even in cases in which labor unions may sue or be sued by association name they have no juridical person citizenship for purposes of diversity jurisdiction. Barron & Holtzoff, *Federal Practice & Procedure*, Section 569. Neither the Supreme Court nor the Court of Appeals for the Fourth Circuit has ever ruled specifically upon the question. See: *Textile Workers Union of America* v. *Cone Mills, Corp.*, 268 F. 2d 920 (4th Cir. 1959).

The approach and rationale of the *Stein* case is extremely persuasive. There appears to be no common sense reason for treating an unincorporated national labor union differently from a corporation. See: 66 Yale L.J. 742.

I am caught on the horns of a dilemma. To remand is to adopt the poorer reasoned but more firmly established rule. To retain jurisdiction may result in several days wasted trial time ending in ultimate dismissal for failure of jurisdiction.

An order remanding a case to the state court from which it was removed is not reviewable on appeal. 28 U.S.C.A. Section 1447(d); Barron & Holtzoff, *Federal Practice &*

Procedure, Section 109. See: *Santa Margarita Mutual Water Co.* v. *State Water Rights Board of the State of California,* 165 F. Supp. 870, 879, for an interesting attempt to secure appellate review.

Retention of jurisdiction *is* appealable, and may be reviewed in the Court of Appeals for the Fourth Circuit. On my own motion, I certify that I am of the opinion that the order I am about to sign denying the motion to remand involves a controlling question of law as to which there is substantial ground for difference of opinion, and I am further of the opinion that an immediate appeal from this order would materially advance the ultimate determination of the [fol. 9] litigation, and would avoid an inherent risk of several days wasted trial time, and be in the interest of justice. Further proceedings in the district court are stayed to permit appeal to be taken from the order dismissing the motion to remand, the application for such review to be made within ten days after the date of the order denying remand. 28 U.S.C.A. Section 1292(b).

Counsel may submit an appropriate order.

This 12th day of November, 1963.

J. B. Craven, Jr., Chief Judge, United States District Court for the Western District of North Carolina.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

ORDER DENYING MOTION TO REMAND—January 9, 1964

This Cause coming on for hearing on plaintiff's motion to remand and the same having been duly considered and pursuant to the memorandum opinion filed in this action on the 13th day of November, 1963, and on the basis of the facts found therein and admitted in the pleadings, the Court concludes as a matter of law that the defendant unincorporated association is a juridical person with residence in the State of Pennsylvania for the purpose of determining the jurisdiction of the Federal Court under 28 U.S.C. 1332.

Upon the foregoing findings and conclusions it is ordered that the plaintiff's motion to remand be denied.

The Court upon its own motion and pursuant to the provisions of 28 U.S.C. 1292 (b) certifies that denial of plain-
[fol. 10] tiff's motion to remand involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order would materially advance the ultimate determination of the litigation and would avoid an inherent risk of several days wasted trial time and would be in the interest of justice and further orders that proceedings in this Court are stayed to permit this application for such review to be made within ten (10) days after the date of this order.

Done this 9th day of January, 1964.

J. B. Craven, Jr., United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

AFFIDAVIT

N. F. White, Jr., being first duly sworn, deposes and says:

That he is an officer of the plaintiff in the captioned action; that the defendant in captioned action is an unincorporated association which has members who are citizens of the State of North Carolina and which has for a number of years and is now doing business in this State by performing a great number of the acts for which it was formed within Mecklenburg County, North Carolina; that the defendant has unionized Republic Steel Corporation in Mecklenburg County and that corporation has many employees who are members of the defendant association and the defendant association customarily represents those employees in all manner of dealings and negotiations with the management of Republic Steel Corporation in Mecklenburg County; that the defendant association prior to the filing of the captioned lawsuit attempted to organize the
[fol. 11] plant of R. H. Bouligny, Inc. in Mecklenburg County and in that plant conducted an active campaign to

solicit the votes of the said employees for the Union in an election to determine whether the defendant association would represent the employees of R. H. Bouligny, Inc. in negotiations and dealings with the management of that company; that the defendant association has a member and representative named Joe Kirk, who is a citizen and resident of the State of North Carolina and who has dealt with R. H. Bouligny, Inc. in performing the acts for which the defendant association was formed and who had solicited the votes of the employees of R. H. Bouligny, Inc. in an active and lengthy campaign in order to get the said employees to appoint the defendant association as its agent in bargaining and dealing with the management of R. H. Bouligny, Inc.

This ..... day of July, 1963.

N. F. White, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

NOTICE FOR REMOVAL

To: R. H. Bouligny, Inc., a corporation, Plaintiff, or Grier, Parker, Poe & Thompson, Attorneys of Record for Plaintiff.

Notice is hereby given that United Steelworkers of America, AFL-CIO, an unincorporated association, will forthwith file in the District Court of the United States for [fol. 12] the Charlotte Division of the Western District of North Carolina its petition, a copy of which is hereto attached, together with a copy of the bond referred to therein for the removal of this cause to the District Court of the United States for the Charlotte Division of the Western District of North Carolina.

United Steelworkers of America, AFL-CIO, By Ledford & Ledford, James B. Ledford, By Cooper, Mitch & Crawford, Its Attorneys.

(Certificate omitted.)

[fol. 21] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9326

R. H. BOULIGNY, INC., a corporation,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association.

On Application for Permission to Take an Appeal under section 1292(b) of Title 28, United States Code, from an interlocutory order.

ORDER ALLOWING APPEAL FROM AN INTERLOCUTORY ORDER, ETC.—January 24, 1964

The United States District Court for the Western District of North Carolina having certified by its order of January 9, 1964, that the denial of plaintiff's motion to remand involves a controlling question of law as to which there is substantial ground for difference of an opinion and that an immediate appeal would materially advance the ultimate determination of the litigation; and R. H. Bouligny, Inc., plaintiff, having applied to this court for permission, in accordance with Section 1292(b) of Title 28, U. S. Code, to take an appeal from said order of January 9, 1964, and copies of said application having on January 15, 1964, been delivered to Ledford & Ledford, Esquires, attorneys for United Steelworkers of America, AFL-CIO, an unincorporated association, and an answer as permitted by Rule 35 of this court having been filed,

[fol. 22] On consideration whereof, it is ordered by this court that permission be, and it is hereby, granted to take an interlocutory appeal from said order of January 9, 1964,

of the United States District Court for the Western District of North Carolina.

January 24, 1964.

Simon E. Sobeloff, Chief Judge, Fourth Circuit; Clement F. Haynsworth, United States Circuit Judge, Herbert S. Boreman, United States Circuit Judge.

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9326

R. H. BOULIGNY, INC., Appellant,

versus

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

J. Braxton Craven, Jr., District Judge.

Argued April 28, 1964. Decided August 6, 1964.

Before Sobeloff, Chief Judge, and Boreman and J. Spencer Bell, Circuit Judges.

Gaston H. Gage and Joseph W. Grier, Jr. (Grier, Parker, Poe & Thompson on brief), for Appellant, and Michael H. Gottesman (David E. Feller, Elliot Bredhoff, Jerry D. Anker, James Ledford, and Cooper, Mitch & Crawford on brief) for Appellee.

OPINION—Filed and Entered August 6, 1964

[fol. 34] J. SPENCER BELL, Circuit Judge:

This is an appeal from an order of the district court denying a motion to remand the case to the state court. The district court has certified the appeal under 28 U.S.C.A. §1292(b)(1958). We exercised our discretion to permit the appeal.

The plaintiff, a North Carolina corporation, brought suit for libel growing out of an organizational campaign in the state court against the defendant, United Steelworkers of America, an unincorporated labor union having its headquarters and principal place of business at Pittsburgh, Pennsylvania. The defendant removed the case to the district court on the grounds both of diversity of citizenship and that the subject matter of the action arises under the laws of the United States. Plaintiff moved to remand the case to the state court. In contesting plaintiffs motion the defendant contended that it is a citizen of Pennsylvania with its principal place of business in that state, conceding, however, that certain of its members are citizens of North Carolina. The district court found the defendant to be "a juridical person as fully and completely as if it were organized as a corporation . . . and that its principal office and place of business is in Pittsburgh, Pennsylvania." It thereupon entered an order denying the motion to remand and certified an appeal to this court. We conclude that the order of the district court must be reversed with instructions to grant the motion to remand.

We discuss first the question of diversity of jurisdiction. In *Bank of the United States* v. *Deveaux,* 9 U.S. (5 Cranch) 37 (1809), Chief Justice Marshall laid down the principle that a corporation is " . . . a mere creature of the law, [fol. 35] invisible, intangible and incorporeal" which for purposes of diversity jurisdiction could not be treated as a citizen, notwithstanding the fact that the corporation could sue and be sued in its own name. In 1844, the court departed from this doctrine in the case of *Louisville, C. & C.R.R.* v. *Letson,* 43 (2 Howard) 497 (1844), holding a

corporation to be "deemed" a citizen of the chartering state. Pressure from the dissenters eventually forced the Court to return to Marshall's concept in *Marshall* v. *Baltimore and Ohio R.R.*, 57 U.S. (16 Howard) 334 (1853), where it held that a corporation was not a citizen but an artificial being and that the citizenship of its stockholders must control. However, the court achieved the same end result as in *Letson* (diversity jurisdiction) by creating a conclusive presumption that all of the stockholders were citizens of the chartering state. This doctrine remained unchanged until 1958 when 28 U.S.C.A. § 1332 was amended by adding section (c). WRIGHT, FEDERAL COURTS 76 (1963). The doctrine has been criticized as an unjustifiable expansion of federal jurisdiction by means of a fiction; nevertheless, unincorporated associations have sought unsuccessfully to bring themselves within the rule.

In *Chapman* v. *Barney*, 129 U.S. 677 (1889), the Supreme Court laid down the rule with respect to unincorporated associations. It held that, for purposes of diversity jurisdiction, the actual citizenship of each of the members of an unincorporated association (in that case a joint stock company) is controlling. In *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U.S. 449, 454-55 (1900), the Court reaffirmed its holding:

> "This court does not hold that either a voluntary association of persons, or an association into a body [fol. 36] politic created by law, is a citizen of a State within the meaning of the Constitution.
>
> . . . .
>
> "But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation."

The Court, referring to the rule with respect to corporations, made it clear that the rule was not to be extended:

> "That a limited partnership association created under the Pennsylvania Statute may be described as a '*quasi* corporation,' having some of the characteristics of a

corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. *That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.*" (Emphasis added.) 177 U.S. at 457.

We find no subsequent decision of the Court which would justify us in concluding that the rule has been extended. The Court did not do so in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922). In that case the Coronado Coal Company brought suit against the international and district and local unions of the United Mine Workers for damages under Section 7 of the Sherman Anti-Trust Act for conspiracy to restrain interstate commerce and to damage plaintiff's property. The unions moved to dismiss on the ground that as unincorporated associations they were not subject to suit. Since there was federal ques-[fol. 37] tion jurisdiction, the diversity of citizenship issue was not involved. In an extended discussion the Court held that unions were suable as such but the Court was careful to limit the application of the rule it was laying down.

"Though such a conclusion as to the suability of trades unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, *it is after all in essence and principle merely a procedural matter.* As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery. . . ." (Emphasis added.) 259 U.S. at 390.

We now come to the case which purportedly has furnished the principal support for those who contend that the rule has been weakened. We think that the case furnishes no support whatsoever for such a position. In *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), the petitioner, People

of Puerto Rico[1] brought suit in the insular court of Puerto Rico again Russell & Co. to collect a Puerto Rican tax assessment. Russell & Co. was an unincorporated association organized under Puerto Rican law as a *Sociedad en Comandita* (S. en C.). In the tradition of the civil law a *Sociedad en Comandita* has many of the characteristics [fol. 38] which both corporations and limited partnerships have under the common law although those of the former predominate. The individual members of the *Sociedad* were not named as parties. They appeared specially and removed the case to the United States District Court for the District of Puerto Rico. The Supreme Court reversed and directed the district court to remand the case to the Puerto Rican insular court. The petition to remove and the decision of the Court were expressly based upon sections 41 and 42 of the Organic Act of Puerto Rico, now 48 U.S.C.A. §§863, 864 (1948). Section 41 provided that in addition to the jurisdiction possessed by the United States District Courts generally, the United States District Court for the District of Puerto Rico should have additionally jurisdiction of "all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States *not domiciled in Puerto Rico*. . . ."[2] (Emphasis added.) Section 42 provided for removal of any case in which the court had original jurisdiction under Section 41. Although in view of the character of the plaintiff, the suit could on no theory be entertained as a diversity

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[1] The fact that the plaintiff was the Puerto Rican Government was itself enough to warn the reader that the case could not involve constitutional diversity jurisdiction. A state, or territory, or political unit cannot be a citizen in that sense. *Postal Tel. Cable* v. *Alabama*, 155 U.S. 482, 487 (1894).

[2] It is obvious that this statute would not be constitutional as applied to an Article III district court. It was valid as enacted because the district court of Puerto Rico was a territorial court created by virtue of the power conferred on the Congress by Article IV §3 to make all needful rules and regulations respecting the territory belonging to the United States. *Balzac* v. *People of Porto Rico*, 258 U.S. 298 (1922); *Porto Rico Ry., Light & Power Co.* v. *Colom*, 106 F. 2d 345 (1 Cir.), *cert. denied*, 308 U.S. 617 (1939).

suit by an Article III court, the Supreme Court said that "admittedly, if the individual members of the *Sociedad* are 'parties' within the meaning of the Organic Act . . . the [fol. 39] suit is one within the jurisdiction of the District Court because of their non-residence, *diversity of citizenship* being unnecessary." 228 U.S. at 478. (Emphasis added.) Thus the question before the Court was simply one of the interpretation of the statute—not a question of constitutional diversity jurisdiction. The Court by analogy to a common law corporation held that the defendant, a civil law *Sociedad* had a domicil in Puerto Rico and thus could not claim the domicil of its individual members to acquire the non-resident status required by the Organic Act. Clearly the case does not by any stretch of the imagination hold that the *Sociedad* was a citizen of Puerto Rico for purposes of diversity jurisdiction under Article III. Nor can the Court's analogy between the civil law *Sociedad* and the common law corporation justify a contention that it was consciously expanding federal diversity jurisdiction.

American Federation of Musicians v. *Stein*, 213 F.2d 679 (6 Cir.), *cert. denied*, 348 U.S. 873 (1954), since it rested upon *Puerto Rico* v. *Russell & Co.*, *supra*, can furnish no support for defendant's contention. Furthermore, although it expressed sympathy with the argument, the case did not hold that a labor union was a citizen for diversity purposes. It merely held that the district court was justified in issuing a temporary injunction until the issue could be fully studied. It is interesting to note that the district court, when it did reach the issue, rejected the contention. *Stein* v. *American Federation of Musicians*, 183 F.Supp. 99 (M.D. Tenn. 1960). After reviewing the cases, the court reached the conclusion that the courts were following the rule that in cases where federal jurisdiction was based on diversity grounds "citizenship of an unincorporated association, including labor unions, is determined [fol. 40] by the citizenship of its individual members." 183 F.Supp. at 100.[3]

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[3] The rationale of *Van Sant* v. *American Express Co.*, 169 F.2d 355 (3 Cir. 1947), which found diversity, appears to be that since a New York joint stock association is treated by the New York

Whatever basis there once was for the belief that *Russell* intended to lay down new principles for the determination of citizenship for diversity jurisdiction purposes, it was reversed by the passage of the 1958 amendment to the diversity statute. Prior to the 1958 amendment which added subparagraph (c) to 28 U.S.C. § 1332 the argument that the courts could substantially equate unincorporated associations with corporations by a minor feat of interpretation was easy to make. The statute spoke only of citizens; the question was whether an unincorporated association should be treated as a citizen—a question merely of interpretation—and the court could resolve it by application of the same kind of presumption that had served in the case of corporations. The 1958 amendment, however, did two things that upset the argument: (1) For the first time, it referred specifically to corporations, providing that they shall be "deemed" citizens. The old presumption that all the stockholders are citizens of the state of incorporation has been abandoned; it is now no necessary part of the argument for attributing citizenship to these [fol. 41] entities. Corporations are treated as citizens because the Act of Congress directs that they be so treated. (2) For many corporations the statute now provides dual citizenship: a corporation is to be treated as a citizen of any state by which it is incorporated, and also of the state in which it maintains its principal place of business. This is, in the first place, confirmation of the fact that the fiction as to the citizenship of the stockholders has been abandoned.

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courts "for all practical purposes" as a corporation it does not fall within the rule of *Chapman* v. *Barney*. The court lays stress on the fact that the issue was not raised by the defendant until rehearing on appeal. The court also cites Prof. Moore's comment on *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, at 2 MOORE'S FEDERAL PRACTICE, 2100, to the effect that the Chapman rule is itself beginning to show signs of being outmoded. Cf. 33 COLUM. L. REV. 540 (1933). We have rejected this interpretation of *Russell*.

In *Mason* v. *American Express Co.*, 33 L.W. 2016 (2 Cir. decided 7/2/64) the Second Circuit was persuaded by the language of *Russell* to extend citizenship to a New York joint stock association for diversity purposes. We must respectfully disagree with that opinion.

It is hardly reasonable to presume that all the stockholders are domiciled in each of two separate states. But the principal point is that, even laying aside the matter of multiple incorporation, unincorporated associations cannot be equated with corporations by a simple judicial decision attributing citizenship to them. They are incapable of dual citizenship, and hence would be treated more favorably than corporations for diversity purposes.

Such associations, if treated as citizens, would also be treated more favorably than corporations in the matter of venue. A corporation may be sued in any district in which it is incorporated, or licensed to do business, or is doing business. 28 U.S.C. §1391(c) (1958). By no stretch of the process of interpretation can this section be read as applying to an unincorporated association. Hence such an association, if treated as a citizen for diversity purposes, would probably be held to be a resident of the district in which its principal office is located, making that district the only proper venue other than the district of the plaintiff's residence.

The Reporters for the American Law Institute's Study of the Division of Jurisdiction between State and Federal Courts are proposing that unincorporated associations be treated as citizens (of the state where the principal place of business is located) for purposes of diversity jurisdic-[fol. 42] tion. See Tent. Draft No. 2, §1301 (b)(2) (1964). This indicates that there is informed sentiment in favor of such a development. *Cf.* Comment, *Unions as Juridical Persons,* 66 YALE L.J. 712 (1957). The proposal, however, is that the change be brought about by an Act of Congress amending the Judicial Code—not by judicial interpretation. The fact that such a change is proposed recognizes the propriety of addressing such a proposal to Congress.[4] It also recognizes the fact that under existing law unincorporated associations cannot be treated as citizens; indeed, in the Commentary (*id.,* p. 61), the law existing to this

[4] We readily concede that vis-a-vis a corporation it would be quite feasible to treat a modern labor union as a citizen for diversity purposes. But the question of policy is certainly not one for decision of an intermediate appellate court.

effect is expressly recognized, though it is said there have been some "inroads" on the rule in recent years.

Having found no diversity, we also think that no federal question jurisdiction exists. The National Labor Relations Act is concerned only with the coercive effect of an alleged libel and not with its character as a common law tort. *Radio Corporation of America,* 106 NLRB No. 251 (1953). In accordance with the doctrine announced in *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), federal courts uniformly have held that libel and slander actions are to be governed by the substantive law of the state in which the torts allegedly occur. *Schenectady Union Publishing Co.* v. *Sweeney,* 122 F.2d 288 (2 Cir. 1941), *aff'd per curiam,* 316 U.S. 642 (1942). Since the National Labor Relations Act is not concerned with libel as a common law tort and the offense is specifically within the aegis of the substantive state law, we find no federal question.

Reversed.

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9326

R. H. BOULIGNY, INC., Appellant,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, an unincorporated association, Appellee.

Appeal From the United States District Court for the Western District of North Carolina.

JUDGMENT—Filed and Entered August 6, 1964

This Cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings not inconsistent with the opinion of the Court filed herein.

Simon E. Sobeloff, Chief Judge, Fourth Circuit; H. S. Boreman, United States Circuit Judge, J. Spencer Bell, United States Circuit Judge.

[fol. 56] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 57]

SUPREME COURT OF THE UNITED STATES

No. 652, October Term, 1964

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner,

vs.

R. H. BOULIGNY, INC.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.